

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1562 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE R.P.DHOLAKIA

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

BHAGABHAI @ BHAGUBHAI

HIRABHAI MACHI

Versus

THE STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 1562 of 2004
MS RUKHSANA M PATHAN for Appellant No.
MR ND GOHIL APP for Respondent No. 1
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CORAM : HON'BLE MR.JUSTICE R.P.DHOLAKIA

Date of decision: 05/04/2005

ORAL JUDGEMENT

The present appellant has been convicted by the
learned Addl. Sessions Judge, Vadodara, in NDPS Case No.3
of 2003 vide judgment and order dated 9-8-2004 for the
offence under Section 20 (1) (b) (ii) read with Sections

8, 20-1 (b) (ii) of the Narcotic Drugs and Psychotropic Substances Act ("NDPS Act" for short) to undergo R.I. for 5 years and fine of Rs.10,000/- and in default, to undergo further R.I. for six months.

2. Being aggrieved by and dissatisfied with the above judgment and order, on 15-8-2004 the accused sent the present appeal through Central Jail, Vadodara, which is numbered as Criminal Appeal No.1562 of 2004. As the appellant has requested for legal assistance before the Legal Services Authority and Ms. Rukhsana M. Pathan has been appointed as the counsel to appear on behalf of the appellant.

3. When the matter come up for admission/ hearing, Ms. Rukhsana Pathan has stated at the bar that she would restrict her arguments only on the point of sentence, and therefore, at the time of admission, the appeal was heard only on the point of sentence.

4. Brief facts of the case are such that Shri Mangalsinh Bhayjibhai, Police Constable of Karjan Police Station had received a secret information while on duty on 28-11-2002 that one Bhagubhai Hirabhai Machhi, resident of Moti Koral, Surat, would pass from Sagdol Chokdi to Moti Koral on foot along with contraband article Ganja in a plastic bag. On receiving the said information, said Mangalsinh Bhayjibhai informed to his superior officer and also made an entry to that effect into the station diary. Thereafter, Panchas were called through Head Constable Gajendarasinh and they were appraised of the information. Thereafter, search of the police personnel and persons of raiding party and the search of the government vehicles were made in the presence of the panchas and primary panchnama to that effect was also drawn. Thereafter, the police personnel and panchas from Nareshwar Outpost went to Sagdol Chokdi in the government vehicle and made a watch. At about 18-30 hours, when one person was coming along with the plastic bag, police constable Mangalsinh identified him as per the description and he was intercepted. He was also appraised regarding the information which they have received and also given him an option to search in the presence of a gazetted officer or a Magistrate, but he refused to do so and permitted the police personnel to search him. On opening the plastic bag which he was carrying in the presence of the panchas, branches and leaves of Ganja in three plastic bags were found. On asking regarding permit and license, said Bhagubhai told that he is not having the same. Thereafter, police constable Kiransinh called weighing persons. On weighing

the above article ganja, it was found to be 2 kgs. and 500 gms. Out of that, two samples of 100 grams each were taken which were sealed wherein seal of P.S.I., Karjan was applied and after following the procedure, rest of the muddamal was also sealed as described in the panchnama. Further, currency notes worth Rs.5,300/found from said Bhagubhai were recovered and panchnama to that effect was made on the spot. Thereafter, complaint was prepared and the accused along with the complaint, panchnama and muddamal was sent to Police Station for registering the offence where it was registered under the provisions of NDPS Act and accused was arrested and after following the procedure he was sent to judicial custody. Thereafter, further investigation was started. At the end of investigation and on receipt of report from FSL, charge-sheet was submitted and matter was transferred to the Court of learned Addl. Sessions Judge, Vadodara, where charge was framed against the accused. As the accused pleaded not guilty to the charge and claimed to be tried, prosecution led oral evidence and produced and relied on documentary evidence. On submission of closing purshish by the prosecution, learned Addl. Sessions Judge, Vadodara recorded further statement of the accused under Section 313 of the Code of Criminal Procedure. After hearing the learned advocates appearing for the respective parties, the accused was convicted as aforesaid.

5. Heard Ms. Rukhsana M. Pathan, learned counsel for the appellant and Mr. N.D.Gohil, learned A.P.P. for the respondent-State.

6. As stated earlier, learned counsel for the appellant has restricted her arguments only on the point of sentence, and therefore, I am not discussing on the other aspects of the case.

7. It is argued by the learned counsel for the appellant that the present appellant was facing the offence under Section 20 (1) (b) (ii) read with Sections 8, 20-1 (b) (ii) of the N.D.P.S. Act. The amended Act came in force with effect from 2-10-2001 while the incident in question has taken place on 28-11-2002, and therefore, according to her, the amended Act would be applicable in the present case. Drawing my attention towards the quantity recovered from the present appellant, it is argued that row ganja allegedly recovered from the appellant was weighing 2 kgs and 500 gms. and when it becomes dry by passage of time, its weight would be reduced. She has taken me through Section 20 of the NDPS Act more particularly 20 (b) (i)

and (ii) and submitted that the legislature has linked the sentence with the quantity recovered and the word "may" used in Section 20 gives discretion to the Court in awarding sentence on the basis of quantity recovered which has not been exercised judiciously by the trial Court. According to her, even the alternative sentence in default of payment of fine is also disproportionate, harsh and not according to law.

8. Learned APP for the State has also not disputed the interpretations made and arguments advanced by the learned counsel for the appellant regarding Section 20 of the NDPS Act regarding small quantity, commercial quantity and quantity lesser than commercial quantity but greater than small quantity. It is contended that even legislature has also given guideline in Column No.55 of the List of Narcotic Drugs and Psychotropic Substances (hereinafter referred to as "the List" for short) as to which will be small quantity and which will be commercial quantity and sentence has been decided accordingly.

9. I have gone through Section 20 more particularly Section 20 (b) (ii) (B) together with column No.55 of the List. Section 20 reads as under :

"20. Punishment for contravention in relation to cannabis plant and cannabis-- Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder, -

(a) cultivates any cannabis ; plant ; or

(b) produces, manufactures, possesses, sells, purchases, transports, imports inter-state, exports inter-State or uses cannabis, shall be punishable-

(i) where such contravention relates to

Cl. (a) with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine which may extend to one lakh rupees ;

(ii) where such contravention relates to sub-clause (b), -

(A) and involves small quantity, with

rigorous imprisonment for a term which may extend to six months, or with fine which may extend to ten thousand rupees, or with both ;

(B) and involves quantity lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years, and with fine which may extend to one lakh rupees ;

(C) and involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees;"

Section 20 (b) (ii) stipulates that where contravention relates to sub-clause (b) then, as per Sec.20 (b) (ii) (A) involving small quantity, i.e. 1000 gms as per column No.55 of the List, punishment prescribed is rigorous imprisonment for a term which may extend to six months or fine which may extend to ten thousand rupees or both. If the quantity is lesser than commercial quantity but greater than small quantity i.e. more than 1000 gms. but less than 20 kgs. as per column No.55 of the List, punishment prescribed is rigorous imprisonment for a term which may extend to ten years and fine which may extend to one lakh rupees and if it is a commercial quantity, i.e. 20 kgs. as per column No.55 of the List, punishment prescribed is rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh but which may extend to two lakh rupees. Here the word "may" used in these sections gives discretion to the Court by the legislature as regards awarding sentence. Once discretion has been vested with the Court, it has to be used legally, properly and reasonably but not arbitrarily or disproportionately. The legislature has found it imperative that the sentence to be awarded should be on the basis of quantity of the muddamal recovered.

10. In the present case before me, since the contraband article recovered from the appellant weighing 2 kgs. and 500 gms. it is neither a small quantity nor a commercial quantity but less than commercial quantity and more than small quantity. Section 20 (b) (ii) (B) has to be kept in mind. This means that proportion of sentence in relation to quantity has to be maintained by the Court. If the trial Court fails to maintain the proportion and award sentence regardless of quantity recovered, there would be disparity in the sentence

awarded. Since the quantity recovered from the present appellant is only 2 kgs. and 500 gms., i.e. more than small quantity and less than the commercial quantity, the sentence prescribed may extend to 10 years. However, merely because the sentence prescribed by the legislature may extend to 10 years, it should not ordinarily be awarded by the trial Court for the aforesaid period but for a period keeping in mind quantity of contraband substance recovered. In the present case, the trial Court has awarded R.I. of 5 years with a fine of Rs.10,000/- which appears to be unjust, improper and disproportionate. Besides, the trial court has not exercised its discretionary power while awarding alternative sentence also. In default of payment of fine, it has awarded six months RI. Hence, I am of the opinion that even for fine also, same proportion is required to be maintained.

11. Keeping in mind the intention of the legislature, the sentence and the alternative sentence to be awarded in this type of offence should be linked with the quantity involved. Here the appellant is in judicial custody since 28-11-2002. He has already undergone sentence of 2 years and 4 months. In view of the above, if the sentence is reduced to the period already undergone by the present appellant along with sentence in default of payment of fine, ends of justice would be met. Hence, the present appeal is required to be partly allowed.

12. This appeal is partly allowed. The sentence awarded by the learned Addl. Sessions Judge, Vadodara in N.D.P.S. Case No. 3 of 2003 is reduced to the period already undergone by the appellant-accused. The appellant is ordered to be set at liberty forthwith, if not required in any other case.

(R.P.Dholakia, J.)

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